

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1885

B
P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

TYRONE BENJAMIN LARKINS,

Plaintiff-Appellee,

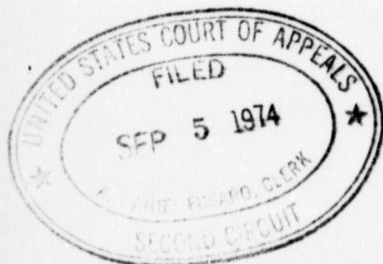
against

RUSSELL G. OSWALD, Commissioner of Correction of New
York State; ERNEST MONTANYE, Warden of Attica Cor-
rectional Facility; LIEUTENANT LEMAR A. CLOR; and
Social Worker GERALD ELMORE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

APPENDIX



LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Two World Trade Center
New York, New York

3

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INDEX TO APPENDIX

	PAGE
Docket Entries	1a
Pro Se Petition	5a
Affidavit of Bedros Odian In Opposition	7a
Plaintiff's Affidavit in Rebuttal	9a
Decision and Order, September 13, 1972	10a
Supplementary Affidavit of Bedros Odian	11a
Complaint	13a
Answer and Demand for Trial by Jury	16a
Defendants' Notice of Motion for Summary Judgment	18a
Affidavit of Bedros Odian in Support of Defendants' Motion for Summary Judgment	19a
Exhibit 1 Annexed to Affidavit of Bedros Odian	23a
Exhibit 3 Annexed to Affidavit of Bedros Odian	30a
Exhibit 4 Annexed to Affidavit of Bedros Odian	31a
Exhibit 5 Annexed to Affidavit of Bedros Odian	37a
Affidavit of LeMar Clor in Support of Defendants' Motion for Summary Judgment	41a

	PAGE
Affidavit of Correction Officer Michael J. Amico in Support of Defendants' Motion for Summary Judgment	42a
Affidavit of Correction Officer Gene A. Tiede in Support of Defendants' Motion for Summary Judgment	44a
Plaintiff's Notice of Cross-Motion for Summary Judgment	45a
Affidavit of Robert B. Conklin in Support of Plaintiff's Cross-Motion for Summary Judgment	46a
Opinion and Order, October 5, 1973	53a
Defendants' Notice of Motion to Set Aside the Verdict as Excessive	57a
Affidavit of Bedros Odian in Support of Defendants' Motion to Set Aside the Verdict as Excessive ..	58a
Opinion and Order, March 14, 1974	59a
Judgment, March 15, 1974	60a
Notice of Appeal	61a

Docket Entries.

TYRONE B. LARKINS

v.

RUSSELL G. OSWALD, Commissioner of Correction of New York State; ERNEST MONTANYE, Warden of Attica Correctional Facility, LIEUTENANT LEMAR A. CLOB; and SOCIAL WORKER GERALD ELMORE.

DATE	PROCEEDINGS
June 29-72	Filed Petition
June 29-72	Filed Decision & Order allowing filing in forma pauperis and order that respondents show cause why petitioner should not be permitted to proceed in forma pauperis, etc.—Curtin, J.—ret. 7/14/72 (notice & copy to petitioner & Mr. Lefkowitz, Bflo.) —submitted
June 29-72	JS 5 made
July 13-72	Filed Defts'. Affidavit in Opposition
July 24-72	Filed Petitioner's Affidavit
Sept. 13-72	Filed Decision & Order dismissing as moot petitioner's application for injunctive relief, allowing petitioner to proceed in forma pauperis as to money damages & appointing Robert B. Conklin as attorney for petitioner-Curtin, J (notice & copy to petitioner & Messrs. Conklin & Lefkowitz, Bflo.)
Nov. 20-72	Filed Petition and Order for Writ of Habeas Corpus. Curtin DJ Copy & notice to petitioner & Messrs. Conklin & Lefkowitz

Docket Entries.

DATE	PROCEEDINGS
Nov. 28-72	Filed Deft's Supplementary Affidavit in Opposition.
Apr. 2-73	Filed Complaint
Apr. 2-73	Issued Summons & 4 copies
Apr. 6-73	Filed Defts. Answer w/demand for trial by Jury
Apr. 6-73	Filed Defts. Notice of Motion and Motion for Summary Judgment ret. 4/13/73
Apr. 26-73	Filed Summons & Mar. Ret on S&C served 4/5/73 on Soc. Worker Elmore; 4/9/73 on Russell Oswald; 4/5/73 on Montanye & 4/24/73 on Ltd. LeMar A. Clor
June 14-73	Oral argument on motion, Adj. to 7/26/73
July 13-73	Filed Pltf's Notice of Cross-Motion for Summary Judgment
July 26-73	Motion by deft. for summary judgment. Cross motion by pltf. for summary judgment. Submitted
Oct. 5-73	Filed decision & order granting partial summary judgment to Pltf. & Attys. are to appear on 10-12-73 to determine what proceedings shall follow-Curtin, DJ Notice & copies to Robert B. Conklin Bedros Odian
Nov. 15-73	Hearing adj. 12-10-73
Nov. 19-73	Filed petition and order for writ of habeas corpus—Curtin, DJ
Nov. 19-73	Issued writ and 4 copies
Jan. 15-74	Filed Petititon & order for writ of habeas corpus with Mar. ret. of execution on 1-11-74 to Monroe Cty. Jail, Roch., N.Y.
Jan. 21-74	Case is reached for trial Jury panel excused until 1-25-74

Docket Entries.

DATE	PROCEEDINGS
Jan. 25-74	Case moved ready for trial-trial before Judge Curtin & Jury; adj. to 1/28/74
Jan. 28-74	Trial continues. Jury finds verdict in favor of pltf. in amount of \$1,000. Judgment to be taken against all four named defts. Court orders stay of entry of Judgment until 2/11/74
Jan. 31-74	Filed defts. notice of motion & affidavit in support of motion to set aside jury verdict ret. 2-7-74
Feb. 8-74	Motion by deft. for reduction of jury verdict. Decision reserved. Ct. orders a stay of the entry of judgment until after decision is filed.
Mar. 15-74	Filed order directing Clerk to enter judgment in the sum of \$1,000 against all defts. jointly & severally, with costs to pltf.—Curtin, DJ Notice & Copies to Robert B. Conklin & Louis J. Lefkowitz
Mar. 15-74	Filed judgment in favor of Pltf. & against defts. jointly & severally in the amount of \$1,000.00 with costs to the Pltf.—Clerk Notice & copies to Robert Conklin & Louis J. Lefkowitz
Mar. 15-74	JS 6 made
Mar. 28-74	Filed Defts'. Affidavit and Notice of Motion for order waiving filing of supersedeas bond and staying execution of judgment pending disposition of appeal-ret. 4/8/74
Mar. 28-74	Filed Defts'. Notice of Appeal (copy mailed 3/29/74 to Mr. Conklin and to Clerk, CCA with copy of docket entries)
Apr. 8-74	Motion by deft. for order waiving filing of supersedeas bond, etc. submitted.

Docket Entries.

DATE	PROCEEDINGS
Apr. 15-74	Filed Defts. notice of motion for an order deleting the names, Russell G. Oswald, Commissioner of Correction & Ernest L. Montanye Warden of Attica as parties in this action ret. 4-18-74.
Apr. 22-74	Filed Defts. motion to extend time for filing record & docketing appeal
Apr. 22-74	Filed Order extending time to transmit record on appeal to 6/26/74—Curtin J. (notice & copy to Mr. Conklin)
Apr. 24-74	Filed Court Reporter's transcript of trial
Apr. 22-74	Motion for order waiving bond. Denied. Motion. Other motions previously filed submitted.
Apr. 29-74	Filed Court Reporter's transcript of proceedings in Chambers on 2/8/74
Apr. 29-74	Filed Court Reporter's transcript of proceedings on 4/22/74
May 1-74	Filed order granting the motion that execution of this judgment is stayed until further order & that the filing of the supersedeas bond is dispensed with. Motion to delete certain defts. denied and motion of Robert B. Conklin to be relieved as counsel is granted—Curtin, DJ Notice & copies to Petr., Robert Conklin & Louis J. Lefkowitz
May 6-74	Filed Bill of Costs in the amt. of \$734.58.

Pro Se Petition.

To:

Honorable John T. Curtin, United States Western District Judge.

Sir:

Please take notice that the petitioner moves this honorable court for monetary damages, for a violation of your petitioner's civil and constitutional rights.

First and foremost it is stressed that your petitioner is a layman at law and all technical errors and form of petitioner's petition should be alleviated [sic] by this honorable court.

FACTS

1. Petitioner was sentenced to the New York State Correction Department from the Kings County Supreme Court, for a term of 25 years to natural life, for the alleged crime of felony murder. Your petitioner was sentenced on the second day of June, 1970. Petitioner was thereafter transferred to the Ossining Correctional Facility.
2. Petitioner was transferred to the Attica Correctional Facility on or about the 19th day of January, 1971.

ALLEGATIONS

It is petitioner's allegation that:

Petitioner was placed in segregation on June 7, 1972 by the Adjustment Committee, for having so-called inflammatory writing in petitioner's cell.*

* The material discovered in plaintiff's cell is reprinted at 23a-29a *infra*.

Pro Se Petition.

That the so-called inflammatory writing that petitioner was placed in segregation for, was of petitioner's political beliefs.

ARGUMENT

It is petitioner's argument that:

Since the so-called inflammatory writing was in petitioner's cell, such writing wasn't harmful or inflammatory to the population of the institution. It has been said that "Idle rhetoric is idle, when it is not in use." It would have been a horse of a different color "if" petitioner would have been on a so-called soap box expressing his beliefs to the population.

LAW AND SUPPORTING AUTHORITIES

This honorable court has jurisdiction over this complaint, under 42 [USC] § 1983, 28 [USC] 1331, of the United States Code.

Under the decision of *Sostre v. McGinnis*, 42 F. 2d 178, 194-99 (2d Cir. 1971), [the Court] states that petitioner can legally have his personal writing in his cell.

CONCLUSION

Petitioner prays that this honorable court grant your petitioner \$5,000 00/xx and release from segregation, and all other relief deemed just by this court . . . !

Respectfully submitted Pro Se
/s/ TYRONE BENJAMIN LARKINS

(Sworn to June 19, 1972.)

Affidavit of Bedros Odian, in Opposition.

STATE OF NEW YORK }
 COUNTY OF ERIE } ss.:
 CITY OF BUFFALO }

BEDROS ODIAN, being duly sworn, deposes and says:

That he is an Assistant Attorney General on the staff of Louis J. Lefkowitz, Attorney General of the State of New York and attorney for the respondents and he is familiar with the proceedings herein.

Investigation disclosed that certain written materials were found in the cell of the petitioner. These materials were confiscated and, after disciplinary proceedings were conducted, the petitioner was confined to Housing Block "Z" for a period of seven (7) days.

A reading of the material would appear to indicate that clandestine activity might be taking place within the prison walls.

Your deponent discussed the matter with Deputy Superintendent Harold Smith and suggested to him that despite certain language in the written materials, to wit:

"Bro. Bob

Dickie and *Valentine* will be the one's that will inform the Party & masses of my whereabouts and activity. Get in touch with Dickie in the yard—the brothers & comrades know about. But you must come around—the Brothers are waiting for you. Take care yourself and keep on pushin!

Prisoner Power/over
Tyranny Power"

[See annexed 7-page Exhibit],

it would be preferable not to get into materials and writings which can be characterized as political materials.

Affidavit of Bedros Odian.

Your deponent ascertained the fact that the petitioner has not incurred any loss of "good time" (See annexed letter dated July 11, 1972).

Your deponent has suggested to Deputy Superintendent Smith that the punishment record of confinement in Housing Block "Z" be expunged. In this way, the incident would be eliminated from having any unfavorable effect upon the petitioner's prison record.

WHEREFORE, it is respectfully prayed that the petition herein be dismissed in all respects.

/s/ BEDROS ODIAN

(Sworn to July 13, 1972.)

Plaintiff's Affidavit in Rebuttal.

Tyrone B. Larkins, being duly sworn, deposes and says:

That he is the plaintiff-petitioner in this proceeding and that he is a laymen at law, and all technical errors should be alleviated [sic].

This affidavit is in rebuttal to the Attorney General's opposition.

The Attorney General is in gross error by submitting to this Court a fraudulent affidavit or statement as evidence, stating that your petitioner was only housed in housing block Z (segregation) for only seven (7) days.

Your petitioner was placed in segregation on June 7, 1972 and was released June 19, 1972, for a total of twelve (12) days.

2. The Attorney General states that a reading of petitioner's personal writing "might" indicate that "clandestine" activity was taking place within the prison walls.

First and foremost, it should be reiterated that the writing of your petitioner was found in petitioner's cell, harmless to anyone.

3. The Attorney General states that your petitioner hasn't lost any good time.

It is very clear that your petitioner is serving a life sentence and therefore under the New York State Penal Law, your petitioner cannot receive or lose good time. But petitioner did lose his night yard privilege deriving from your petitioner's incarceration in segregation.

Wherefore, it is prayed that a hearing be held and petitioner be awarded \$5,000 in monetary damages.

Respectfully Submitted Pro Se
/s/ TYRONE B. LARKINS

(Sworn to July 20, 1972.)

Decision and Order, September 13, 1972.

In response to the court's order entered June 29, 1972, respondents' counsel has filed an affidavit with attachments. Petitioner has submitted a reply.

Respondents' counsel indicates that certain handwritten documents of a political nature were found in petitioner's cell and confiscated. Subsequent disciplinary proceedings resulted in petitioner's confinement in Housing Block Z. Respondents' counsel indicates that the period of confinement was seven days, while petitioner's reply affidavit contends that it was twelve days. In any event, the punishment was contrary to the principles set forth in *Sostre v. McGinnis*, 442 F.2d 178, 202-03 (2d Cir. 1971). Respondents' counsel recognizes this fact, for he assures the court that petitioner will not incur a loss of "good time" as a result of the incident and that any record of punishment for the incident will be expunged. Upon these representations by respondents' counsel, petitioner's application for injunctive relief is dismissed as moot.

Petitioner also seeks \$5,000 in damages, however, and, as to this aspect of the case, it is hereby ordered that petitioner be allowed to proceed further in forma pauperis. It is hereby further ordered that Robert B. Conklin, Esq. be appointed to represent petitioner in this matter.

So ordered.

/s/ JOHN T. CURTIN
United States District Judge

Dated: September 13, 1972.

Supplementary Affidavit of Bedros Odian.

STATE OF NEW YORK }
 COUNTY OF ERIE } ss.:
 CITY OF BUFFALO }

BEDROS ODIAN, being duly sworn, deposes and says:

That he is the Assistant Attorney General representing the respondents in the proceedings herein.

That the affidavit of July 13, 1972, by your deponent was not in any manner intended as an admission of liability. While the respondents recognize the principles enunciated in *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), they do maintain that the petitioner is communicating with other inmates and encouraging them to oppose lawful authority and to violate valid regulations.

One of the writings in question invites contact with a certain "Dickie" and "Valentine". A correction officer, reasonably and prudently can assume that such a writing was intended for transmittal to the addressee, "Bro. Bob". The writing can reasonably be viewed as a part of a larger plan to organize for the purpose of impeding the administration of the prison.

Clearly, *Sostre v. McGinnis* does not allow surreptitious communications among inmates. What could be more inflammatory in a prison than the words, "Prisoner Power over Tyranny [sic] Power" and the circulation of writings containing such language?

In good faith, your deponent advised the expunging of the prison disciplinary record, to restore the petitioner to his status quo prior to the disciplinary proceedings. The respondents acted in good faith to drop the matter.

Supplemental Affidavit of Bedros Odian.

At the scheduled hearing in this Court, your deponent will offer to return to the petitioner the four sheets of paper which is [sic] the subject of this litigation.

The respondents contend that the petitioner did not suffer any deprivation of constitutional rights, nor did he incur any damages.

WHEREFORE, your deponent prays that the petition herein be dismissed in all respects.

/s/ BEDROS ODIAN

(Sworn to November 28, 1972.)

Complaint.

Plaintiff by his attorney, Robert B. Conklin, for his complaint against the defendants herein, upon information and belief alleges:

FIRST: Plaintiff is, and at all times hereinafter mentioned was, a resident of the State of New York.

SECOND: Defendants are, and at all times hereinafter mentioned were, residents of the State of New York and employed by the New York State Department of Correction.

THIRD: This action is brought pursuant to the Civil Rights Act (42 U.S.C. § 1983; 28 U.S.C. § 1343) seeking money damages against the defendants for violations of plaintiff's rights under the First, Fifth and Fourteenth Amendments of the United States Constitution.

FOURTH: From on or about January 19, 1971, to on or about December 7, 1972, plaintiff was confined to the Attica Correctional Facility, Attica, New York.

FIFTH: From on or about June 7, 1972 through and including on or about June 19, 1972, the defendant, Russell G. Oswald, was Commissioner of the Department of Correction of the State of New York charged with the duties and responsibilities set forth in the applicable provisions of the Correction Law of the State of New York. During the same period, the defendant, Ernest L. Montayne, was Warden or Superintendent of the Attica Correctional Facility, charged with the duties and responsibilities set forth in the applicable provisions of the Correction Law of the State of New York. During the same period, the defendants, Lieutenant LeMar A. Clor and Social Worker Gerald Elmore, were employees of the New York State Department of Cor-

Complaint.

rection and were stationed at the Attica Correctional Facility acting under the supervision and control of the defendants, Ernest L. Montayne and Russell G. Oswald.

SIXTH: On or about June 7, 1972, plaintiff was confined in isolation (Housing Block "Z") on a misbehavior report for having inflammatory and revolutionary papers in his possession on or about June 6, 1972. Plaintiff was confined for approximately twelve (12) days. In truth and in fact, the written materials, alleged to be inflammatory and revolutionary papers, were found in plaintiff's cell, and said papers were not being distributed or published by the plaintiff at the time of the alleged "misbehavior report".

SEVENTH: The punitive isolation of plaintiff from on or about June 7, 1972 through and including on or about June 19, 1972 was ordered by the Attica Adjustment Committee, which Committee at that time was comprised of, among others, the defendants Lieutenant LeMar A. Clor and Social Worker Gerald Elmore. In addition, the defendants, Ernest L. Montayne and Russell G. Oswald knew, or should have known, that the plaintiff had been isolated for the reasons and during the period hereinbefore alleged. Notwithstanding the actual or constructive knowledge, on the part of the defendants, Russell G. Oswald and Ernest L. Montayne, of the plaintiff's punitive isolation for the reasons and during the period hereinbefore alleged, said defendants took no action to release or relieve the plaintiff from the conditions of his punitive isolation.

EIGHTH: The punitive isolation of the plaintiff during the time and for the reasons hereinbefore alleged was a violation of plaintiff's rights under the First, Fifth and Fourteenth Amendments of the United States Constitution and, consequently, a violation of the Civil Rights Act (42 U.S.C. § 1983).

Complaint.

NINTH: As a result of the wrongful conduct of the defendants in punitively isolating the plaintiff during the time and for the reasons hereinbefore alleged, plaintiff was caused to suffer serious psychological and mental distress, was isolated from the general population of the Attica Correctional Facility, was not allowed to exercise or participate in other activities available to prisoners in general population, was deprived of "night privileges" with general population for a period of approximately thirty (30) days after June 7, 1972, and otherwise suffered, all to his damage in the amount of \$5,000.00.

WHEREFORE, plaintiff demands judgment against the defendants, jointly and severally, in the amount of \$5,000.00 together with the costs and disbursements of this action.

ROBERT B. CONKLIN, Esq.
Attorney for Plaintiff,
Tyrone Benjamin Larkins
Office and P. O. Address
1800 One M & T Plaza
Buffalo, New York, 14203

Dated:
Buffalo, New York
March 6, 1973

Answer and Demand for Trial by Jury.

ANSWER

Defendants, by their attorney, Louis J. Lefkowitz, Attorney General of the State of New York, for their answer to the complaint, respectfully show to the Court:

ADMIT paragraphs designed as "First", "Second", "Third", "Fourth" and "Fifth".

DENY all of paragraph designated as "Sixth" which tends to say that inflammatory and revolutionary papers were not being distributed or published.

AS AN AFFIRMATIVE DEFENSE

Neither DENY nor ADMIT paragraphs designated as "Seventh", "Eighth" and "Ninth" for the reason that the defendants at all times acted lawfully and within the scope of their authority.

AS A FURTHER DEFENSE

DENY that the plaintiff suffered any damages whatsoever.

DENY that the constitutional rights of the plaintiff were violated.

Allege that at all times the defendants acted in accordance with the United States and New York State Constitutions and amendments thereto and the various statutes thereunder.

WHEREFORE, it is prayed that the complaint be dismissed in every respect.

Answer and Demand for Trial by Jury.

TRIAL BY JURY

Trial by jury is demanded.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
65 Court Street
Buffalo, New York 14202

By:
/s/ Bedros Odian
of Counsel

April 6, 1973

To: ROBERT B. CONKLIN, Esq.
Attorney for Plaintiff
1800 M & T Plaza
Buffalo, New York 14203

Defendants' Notice of Motion for Summary Judgment.

SIR:

PLEASE TAKE NOTICE, that the undersigned will bring on the motion herein for hearing before this Court at Part II, United States Court House, 68 Court Street, City of Buffalo, on the 13th day of April, 1973, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

MOTION FOR SUMMARY JUDGMENT

Defendants move the Court to enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in the defendants' favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment as a matter of law.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
65 Court Street
Buffalo, New York 14202

By: /s/ Bedros Odian
of Counsel

April 6, 1973

To: ROBERT B. CONKLIN, Esq.
Attorney for Plaintiff
1800 M & T Plaza
Buffalo, New York 14203

**Affidavit of Bedros Odian, in Support of Defendants'
Motion for Summary Judgment.**

STATE OF NEW YORK }
COUNTY OF ERIE } ss.:
CITY OF BUFFALO }

BEDROS ODIAN, being duly sworn deposes and says:

He is an Assistant Attorney General on the staff of the New York State Attorney General and he is familiar with the proceedings herein.

He makes this affidavit in support of motion for summary judgment.

Annexed hereto are the following:

EXHIBIT "1" — Typewritten copy of Exhibit "2".

EXHIBIT "2" — Photocopy of writing confiscated from the cell of TYRONE B. LARKINS.

EXHIBIT "3" — Photocopy of writing confiscated from the cell of LARRY TINSLEY describing a nitroglycerine explosive.

EXHIBIT "4" — Adjustment Committee Report for TYRONE B. LARKINS.

EXHIBIT "5" — Adjustment Committee Report for LARRY TINSLEY.

Affidavit of Correction Lieutenant LEMAR CLOR sworn to on April 4, 1973.

Affidavit of Correction Officer MICHAEL J. AMICO sworn to on April 4, 1973.

Affidavit of Correction Officer GENE A. TIEDE sworn to on April 4, 1973.

In good faith, your deponent prevailed upon the Deputy Superintendent of Attica Correctional Facility to expunge

Affidavit of Bedros Odian.

the plaintiff's record of the disciplinary proceedings involved in this action and to restore the petitioner's loss of good time. Your deponent informed this Court of the action taken in an affidavit dated July 13, 1972. It was not intended that your deponent's affidavit be construed, in any way, as an admission of fault or liability. In a supplementary affidavit dated November 28, 1972, your deponent described the inflammatory nature of the writing taken from the petitioner's cell.

The plaintiff was not satisfied with a restoration of his good time. His aim was to foment dissent and discontent among all inmates against the administration of the institution. Indeed, his objective was the overthrow by force of the lawful authority of the institution.

The affidavit of Lieutenant Clor states that the petitioner, when he was charged by the Adjustment Committee, did not deny that he lectured to five inmates about the overthrow of the institution. One of the inmates in the group was LARRY TINSLEY.

When Officers Amico and Tiede examined the cells of LARKINS and TINSLEY, they discovered the inflammatory handwritten document in Larkins' cell (EXHIBIT "2") and a handwritten description of a nitroglycerine explosive in Tinsley's cell.

It would be naive to assume that the writings in LARKINS' cell was merely political literature for his own edification. That material, by its very nature, was intended to be circulated.

In the Adjustment Committee hearing, LARKINS readily acknowledged that he advocated revolution. The concern herein is not LARKINS' beliefs but, rather, the objective facts. Viewed in its entirety—LARKINS' lecturing to a group of inmates on the desirability of forcible overthrow of authority, his possession of a writing which clearly indicates a surreptitious plan, a description of a nitroglycerine

Affidavit of Bedros Odian.

explosive—compels the conclusion that LARKINS was participating in a conspiracy to bring about a calamity within the institution.

There can be no doubt that the writing to "Bro. Bob" wherein "Bro. Bob" should "Get in touch with Dickie in the yard" was an actual communication between two inmates.

What are guards expected to do? Be oblivious to their surroundings which, at best, always contain the potential for danger? Must guards stand idly by in the face of defiance to lawful authority?

After experiencing, in 1971, the worst prison riot in United States history, Attica guards are understandably alert to any activity which endangers the safety of the institution. And no inmate should be permitted to proceed under the guise of constitutional rights when it is he, the inmate, who is instigating the dangerous condition.

"The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Preaching defiance, by speech or writing, within the confines of a state prison is unquestionably fraught with as much danger as shouting fire in a theater.

Who is to set the "line of division" between permissible conduct and prohibited conduct, in those circumstances where but one or a handful of inmates are seeking to spark a chain reaction which results in a panic engulfing the entire institution?

Petitioner LARKINS seeks to instigate a situation which he knows is dangerous and, because institutional personnel prohibits such conduct and imposes proper sanctions, he, LARKINS, asks the Court to determine that the prison personnel are the wrongdoers.

Affidavit of Bedros Odian.

" . . . the federal courts, whether in habeas corpus or in Section 1983 contexts, should not be unduly hospitable forums for the complaints of either State or federal convicts; it is not the function of the courts to run the prisons, or to undertake to supervise the day-to-day treatment and disciplining of individual inmates; much must be left to the discretion and good faith of prison administrators." *Sawyer v. Sigler*, 445 F.2d 818, 819 (8 Cir. 1971).

The complaint herein should be dismissed in every respect.

/s/ BEDROS ODIAN

(Sworn to April 6, 1973.)

Exhibit "1", Annexed to the Affidavit of Bedros Odian,* Writings Confiscated From the Cell of Tyrone Larkins.

Bro. Bob:

Dickie and *Valentine* will be the one's that will inform the Party & masses of my whereabouts and activity.

Get in touch with Dickie in the yard—the brothers & comrades know about. But you must come around—the Brothers are waying for you. Take care yourself and keep on pushin!

Prisoner Power/over

Tyranny Power

"All Power to the People"

¡ Palante Hasta La Victoria!

Venceremos.

Ho Chi Minh—P.R.N.L.F.

(Younglords Party)

G.I.

Jose Enrique Paris

* Exhibit "1" to the affidavit was a typewritten copy of the writings confiscated from plaintiff's cell. Exhibit "2" was a copy of the actual handwritten material and is not reprinted in this appendix.

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

Central—Revolutionary Format

The central committee must be highly enformed, equipped, mobilized and coordinated to ensure its operating efficiency and survival consisting of well disciplined, dedicated, and oriented gurrilla's. This revolutionary organization functions lies in its ability to maintain and commite to effective utilization, an agency responsible for collecting analysis, publishment, and distribution to unit segments. The elements of this agency should consist of (A) chief tactician, (B) tactical mission planners, (C) reconnoissance team, (D) mobile communication team, (E) mobile strike force, (F) heavy weapons crew, (G) special forces unites, and (H) rescue and recovery unit.

(A) The chief tactician job is the supervision of the entire agency. He is its sole comraander and is responsible for the arranging and movement of its troops, for the orderly planning of manevers and to use such to its best advantage.

(xs) Tactical mission planners are teams chiefs from each unit segment and headed by the chief tactician. The reason for the unit is obvious. The success of the agency depends upon all units, when in action, to perform as one co-ordination demands that each unit must know his individual as well as collective function during any kind of maneuvers, whether in practice or in an actual situation.

This committee's primary objective at this point is revolutionary-political education.

1. Each brother-comrade will adhere to the revolutionary-catechism.

2. Each cell commander will exchange political, social, economic and military information on a daily basis.

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

3. Each cell commander will have a cell not exceeding four men, and each comrade will not know who the others are. Each recruit after he has been revolutionary orientated will have a cell of comrades, etc., forming a pyramid structure.

4. Revolutionary educational curriculum.

(A) Political indoctrination the irradiating of all western european concepts. The doctrine of a black afro-centric viewpoint within a black frame work, correct ideology in terms of international perspective.

(B) Social & cultural indoctrination: How people function in a given society with false culture assimilation, as well with proper culture awareness. Laws governing such actions, and environmental effects.

Economic indoctrination: pertaining to the production, distribution and consumption of wealth and the means of control, monetary systems and their effects on people in a society.

Military industrial complex, army, navy, air force, national guard militia, and reserves. Guerilla warfare, etc.

This concludes our brief description and introduction of a tactical intelligence and combat unit.

This revolutionary organizations authoritative command is the more sophisticated strategic intelligence and planning division.

The Black Panther Party

Ten Point Program—Platform

1. We want freedom, we want power to determine the destiny of our black community. . . . We believe that the

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

black people will not be free until they are able to determine their own destiny.

2. We want full employment for our people . . .

We believe that the federal government, or a guaranteed income.

We believe that if the white american businessman will not give full employment, the means of production should be taken from the businessman and placed in the community, so that the people of the community can organize and employ all of its people and give a higher standard of living.

3. We want an end to the robbery by the whiteman of our black community . . . We believe that this racist government has robbed us and now are demanding the overdue debt of (40) forty acres and two (2) mules. Forty acres and two mules was promised one hundred (100) years ago as restitution for slave labor, and mass murder of black people. So we will accept the payment in property or currency, which will be distributed to our many communities. The Germans are aiding the jews in Israel for the genocide of the jewish people. The Germans murdered six (6) million jews. The American racists has taken part in the slaughter of over fifty (50) million black people, therefore, we feel that this is a modest demand.

4. We want decent housing, fit for the shelter of human beings . . . We believe that if the white landlords will not give decent housing to our black community, then the housing & land should be made into co-operatives so that our community with government aid can build decent housing for its people.

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

5. We want education for our people, that exposes the true nature of this decadent American society . . .

We want education that teach us our true history and our role in the present-day-society. We believe in an educational system that will give to our people a knowledge of self. If man does not have knowledge of himself and his position in society and the world, then he has little chance of relating to anything else.

6. We want all black men to be exempt from military service. . . . We believe the black people shouldn't be forced to fight in the military service to defend a racist government, that does not protect us. We will not kill other people of color in the world who like black are being victimized by the white racist government of America. We will protect ourselves from the force and violence of the racist police and the racist military, by whatever means possible.

7. We want an immediate end to police brutality and murder of black people. . . . We believe that we can end police brutality in our black communities by organizing black self-defense groups, that are dedicated to defend our communityis from ractis police oppression and brutality. The second Amendment to the constitution of the United States gives us a right to bear arms. We therefore believe that all black people should arm themself's for self-defense.

8. We want freedom for all black men held in federal, state, county and city prisons and jails. . . .

We believe that all black people should be released from the many jails and prisons, because they have not received a fair and impartial trial.

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

9. We want all black people when brought to trial, to be tried in a court by a jury of their own peers groups or people from their own communities as defined by the Constitution of the United States . . . We believe that the courts should follow the United States constitution, so that blacks can receive fair trials. The Fourteenth (14) Amendment of the United States Constitution gives a man the economical, racial background, social, religious, geographica, environmental, historical, and from this the Court will be forced to select a jury, from the black community from whichever one the defendant come. We have been and are being tried by all-white juries that have no understanding of the average reasoning man in the black community.

10. We want land, bread, housing, education, clothing, justice and peace. And as our major political objective, a United Nations supervised plebiscite to be held throughout the black colony in which only black colonial subjects will be allowed to participate, for the purpose of determining the will of black people as to their national destiny. . . .

For when in the courage of human events it becomes necessary for one people to dissolve the political bonds which have connected them with others and to assume among the powers of the earth, the separated and equal stations to which the laws of nature and god entitles them to a decent respect to the opinion of mankind inquiries that they should declare the causes which impel them to the separation. For we hold this truth to be self-evident, that all men are created equal, that they are endorsed by their creators with certain inalienable rights the among these life, liberty and the pursuit of happiness. That to

*Exhibit "1", Annexed to the Affidavit of Bedros Odian,
Writings Confiscated From the Cell of Tyrone Larkins.*

secure these rights, governments or instituted, that whatever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it and to institute a new government laying its foundation on such principals, organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence indeed will dictate that governments long established should not charged for light and trainsient can see, and accordingly all experience both show that mankind is more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed, but when a long train of abuse and usurpation, pursuing inwardly the same object engineering a design to reduce, then under absolute despotism, it is then right, it is their duty to throw off such government and to provide new guards for their future security.

"All Power to the People"

Power to the Vanguard!

30a

**Exhibit "3", Annexed to the Affidavit of
Bedros Odian.**

Writing Confiscated from Cell of Larry Tinsley*

10/27

C-4

A plastic explosive compound used for military use.
Comprised of Nitrathylamine (a volatile form of nitro
glycerine). Potassium and chip form of Plastic Cordite
with a *form* 1 of synthetic Magnesium.

Comes in sticks approx, 1 ft. long 3 to 4 ins. wide and
1 to 1½ ins. thick. It's white and pliable (similar to
putty).

* A copy of the handwritten material appeared in the original
motion papers.

Exhibit "4", Annexed to Affidavit of Bedros Odian.

ADJUSTMENT COMMITTEE MATERIAL ON TYRONE B. LARKINS

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES*Attica Correctional Facility*
(Facility)SUPERINTENDENT'S ACTION ON REVIEW OF
ADJUSTMENT COMMITTEE REPORT

- 1) Name of Inmate *Larkins, Tyrone* No. 26607
- 2) Date of report under review *6-6-72* Dates of reappearance reports
- 3) Action of Committee ☒ Confined ..Reversed ..Modified
- 4) Instructions
- 5) Comments and/or Reasons

/s/ *R. T. Curtiss*
Signature*Actg. DS*
Title*6-7-72*
DateSTATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES*Attica Correctional Facility*
(Facility)

NOTICE TO INMATE

To: *Larkins, Tyrone*

No. 26607

Cell 10-16

You are hereby notified that a review has been made, by the Superintendent, of an adjustment committee action on recommendation made on 6-7-72 concerning your behavior in this facility and that the following disposition has been ordered: *Confinement in HBZ for 7 days with loss of yard and recreation.*

Exhibit "4", Annexed to Affidavit of Bedros Odian.

If the disposition results in the denial of a privilege for a more than sixty days or in confinement in your cell or in a special housing unit for more than thirty days, for such behavior, it will automatically be reviewed by the Commissioner of Corrections and you are further specifically notified that you may communicate in writing to the Commissioner of Corrections in connection with this matter.

/s/ *R. T. Curtiss*
Signature

Actg. DS
Title

6-7-72
Date

State of New York—Department of Correction
ATTICA CORRECTIONAL FACILITY
(Facility)

ADJUSTMENT COMMITTEE REPORT

- 1) Name of Inmate *LARKINS, Tyrone* No. 26607
- 2) Report under review made by *C.O. Amico* Date *6-6-72*
- 3) Comments on review of report and inmate file *one previous misbehavior report in the last six months.*

/s/ *Gerald R. Elmore*
Signature of Committee Member

6/7/72
Date

- 4) Inmate's explanation and attitude *Inmate appears belligerent and uncooperative toward institutional policies—believes in revolution—inmate admits affiliaties [sic] to Black Panter Party.*
- 5) Further investigation made ☐ No ☐ Yes (Attach Form 252AS)
- 6) Disposition ☐ Deferred Action ☒ Action ☐ Recommendation

Exhibit "4", Annexed to Affidavit of Bedros Odian.

(specify) *Confinement in HBZ for 7 days with loss of yard and recreation*

- 7) Where action deferred, specify duration of deferral and whether officers directed to forward future comments ☐ Yes ☐ No
- 8) Is inmate to appear again ☐ No ☒ Yes Date *June 14, 1972* (on reappearances use Form 252B)
- 9) Where inmate was locked in cell or in special housing unit prior to disposition specify length of time to date *1 day*
- 10) Does present disposition necessitate automatic review ☒ No ☐ Yes

/s/ *LeMar A. Clor*
Signature of Chairman

L-L
Title

6/7/72
Date

RE: INMATE *LARKINS, Tyrone*
A Blk

No. 26607

ATTICA CORRECTIONAL FACILITY

INMATE MISBEHAVIOR REPORT
TO SUPERINTENDANT

- 1) Name of Inmate *Tyrone Larkins* No. 26607. Cell
10/16 First Last
- 2) Location of Incident *10* Date *6 Jun 72* Time *3:00 P.M.*
- 3) Description *Upon observing this man in the yard with a group of inmates Officer Tiede and myself frisked this man's cell and found Black Pantor [sic] Party*

Exhibit "4", Annexed to Affidavit of Bedros Odian.

papers and revolutionary papers in his cell (copies are attached)

Evidence: 4 papers

- 4 Was more than one inmate involved? (X) Yes () No
- 5) If yes, give name and number of other inmates (where known) and describe role played by subject inmate
Larry Tinsley 27825 10/27 in with group of known Black Panthers, cell was frisked, contraband found
- 6) Was inmate locked in cell? (X) Yes () No
- 7) Was inmate locked in other housing unit? () Yes (X) No
- If yes, (a) housing unit of present confinement
Cell
- (b) authorized by
- 8) Was physical force used by you? () Yes (X) No
(If answer is yes, also file Form 251D)

/s/ *Michael J. Amico* CO
Signature of person making report Title

Date: 6 Jun 72

- 9) Endorsements of other employee witnesses
(If any)

/s/ *G. Liede* C.O.
Signature Title

(No. of supplementary sheets)

Signature Title

INDETERMINATE - PUNISHMENT RECORD

DATE	D. C.	TIME FORFEITED	OFFENSE
1-17-71	Pac.	on transfer	from OCF as T-26607
2-21-71	W. L. L.	18-12	
4-30-72	2	KL 3 days	- Leaving marching company w/o permission to talk to somebody.
7-2-71	Sargent	1 day	Ingle
7-17-71	M. L. L.	18-12	
7-18-71	M. L. L.	24-40	
9-13-71	Pat.	1 day	Wounded in D. yd
9-19-71	A. B. L.	1-7-71	
7-16-72	1	7 days, KL	- Disobeying direct order to stand for night count. Giles
2-11-72	H. L. L.	5L 11	
2-25-72	H. L. L.	1-13	
3-4-72	H. L. L.	1-41	
3-11-72	H. L. L.	10-15	
6-7-72	H. L. L.	CE-15	
5-6-72	2	KL in H. L. 7 days w/no yd or rec.	- Had in his poss. revolutionary papers, Black Panther Party Papers.
5-16-72	M. L. L.	18-14	Amico

NAME

LAPKINS, Tyrone

No. 26607

INVESTIGATION SERVICE

HINGE

26607 OCF

1. Armed w/ loaded pistol shot & killed man-

HINGE

3

NAME LEXKINS, Tyrone	1. Armed w/ loaded pistol shot & killed man- 2. Armed w/ loaded pistol shot & killed man- 3. Armed w/ loaded pistol shot & killed man-	GRADE Class "A" & "B"
ALIAS NONE	ALIAS street-day.	JAIL TIME 546 Days
CRIME 1. Armed Robbery 2nd	TERM MIN. 25-0-0 MAX Life	P.C. 12-13-73
JUDGE 1. Gittleson 2. Kern	COURT Supremo	EXPIRES 7/1
DATE SENTENCED 6-2-70	COUNTY Kings	REC'D AT ATTICA 1-19-71 Fr. OCF
AGE 22 COLOR Black	DOMESTIC RELATIONS Single-C.L.W.	REC'D AT OCF 6-15-70 #146187
HEIGHT 5'7 1/2" WEIGHT 155	No. OF CHILDREN Two	PREVIOUS TERM 5/10 other shoot
HABITS Non-Urban-Cocaine	RELIGION Protestant	TERMINATION 11-11
EDUCATION 11th Grade	OCCUPATION Ass't. Store Manager	
HEALTH	EMPLOYED No	
BORN 2-5-43 Brooklyn, NY	FATHER Unknown	
CAME TO U.S.	MOTHER Living	
POINT OF ENTRY	BROTHERS OR SISTERS (2) Sing. Living	
CITIZENSHIP		
DOCTORS REMARKS	USIA NEWAM	DISCHARGED

NAME

No.

26607

SIGN UNASSIGNED 10-14

Y-EM-8 IN
NAME LAPINS, Tyrone

No. 26607

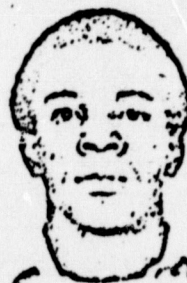
36a

YE-134 A

GRADE RECORD

PHOTOGRAPH

SERVICE RECORD



T-26607

SHOP RECORD

Assign. Rpt. 7
Assigned to T-26607

Exhibit "5", Annexed to Affidavit of Bedros Odian.**ADJUSTMENT COMMITTEE MATERIAL ON LARRY TINSLEY***

STATE OF NEW YORK—
DEPARTMENT OF CORRECTIONAL FACILITY
Attica Correctional Facility
(Facility)

SUPERINTENDENT'S ACTION ON REVIEW OF
ADJUSTMENT COMMITTEE REPORT

- 1) Name of Inmate *Tinsley, Larry* No. 27825
- 2) Date of report under review 6-6-72 Dates of reappearance reports
- 3) Action of Committee ☒ Confined .. Reversed .. Modified
- 4) Instructions
- 5) Comments and/or Reasons

/s/ *R. T. Curtiss*
Signature

Actg. DS
Title

6-7-72
Date

STATE OF NEW YORK—
DEPARTMENT OF CORRECTIONAL SERVICES
Attica Correctional Facility
(Facility)

NOTICE TO INMATE

To: *Tinsley, Larry* No. 27825 Cell 10-22

You are hereby notified that a review has been made, by the Superintendent, of an adjustment committee action on recommendation made on 6-7-72 concerning your behavior

* Omitting Mr. Tinsley's prior disciplinary record.

Exhibit "5", Annexed to Affidavit of Bedros Odian.

in this facility and that the following disposition has been ordered: *Counseled and Released.*

If the dispositon results in the denial of a privilege for more than sixty days or in confinement in your cell or in a special housing unit for more than thirty days, for such behavior, it will automatically be reviewed by the Commissioner of Corrections and you are further specifically notified that you may communicate in writing to the Commissioner of Corrections in connection with this matter.

/s/ R. T. Curtiss
Signature

Actg. DS
Title

6-7-72
Date

State of New York—Department of Correction
Attica Correctional Facility
(Facility)

ADJUSTMENT COMMITTEE REPORT

- 1) Name of Inmate *Tinsley, Larry* No. 27825
- 2) Report under review made by *C.O. G. Tiede* Date 6-6-72
- 3) Comments on review of report and inmate file *Numerous previous misbehavior reports.*

/s/ Gerald R. Elmore
Signature of Committee Member

June 7, 1972
Date

- 4) Inmate's explanation and attitude *Inmate appears co-operative and respectful toward this committee.*
- 5) Further investigation made ☒ No ☐ Yes. (Attach Form 252AS)
- 6) Disposition ☐ Deferred Action ☒ Action ☐ Recommendation (specify) *Counseled & released*

Exhibit "5", Annexed to Affidavit of Bedros Odian.

- 7) Where action deferred, specify duration of deferral . . .
and whether officers directed to forward future comments ☐ Yes ☒ No
- 8) Is inmate to appear again ☒ No ☐ Yes Date
(on reappearances use Form 252B)
- 9) Where inmate was locked in cell or in special housing unit housing prior to disposition specify length of time to date *1 day*
- 10) Does present disposition necessitate automatic review
☒ No ☐ Yes

/s/ *LeMar A. Clor*
Signature of Chairman

Lt.
Title

June 7, 1972
Date

RE: INMATE *Tinsley, Larry*
A Blk

No. 27825

STATE OF NEW YORK—DEPARTMENT OF CORRECTION

ATTICA CORRECTIONAL FACILITY

INMATE MISBEHAVIOR REPORT

INMATE MISBEHAVIOR REPORT TO SUPERINTENDENT

- 1) Name of Inmate: *Larry Tinsley*. No. 27825. Cell 10-27.
First Last
- 2) Location of Incident: *A yd.—10-27 Cell*. Date: *6-6-72*,
Time: *2:45 p.m.*
- 3) Description: *About 2:30 today I noticed a meeting in the yard of inmates. I informed J. King on the platform and he identified Tinsley, #27825 and Larkins, #26607. Larkins was leading the meeting. I went inside, informed Milce Amico and showed him the meet-*

Exhibit "5", Annexed to Affidavit of Bedros Odian.

ing and then we went up and frisked their cells. We found the attached.

- 4) Was more than one inmate involved? (X) Yes () No.
- 5) If yes, give name and number of other inmates (where known) and describe role played by subject inmate.
Tyrone Larkins—26607—leader of group in yard and possessor of black panther revolutionary material.
- 6) Was inmate locked in cell? (X) Yes () No.
- 7) Was inmate locked in other housing unit? () Yes (X) No. If yes, (a) housing unit of present confinement Cell (b) authorized by

- 8) Was physical force used by you? () Yes (X) No.
 (If answer is yes, also file Form 251D).

Signature /s/ *Gene Tiede* Title *CO*

Date: 6-6-72

Signature of person making report Title

- 9) Endorsement of other employee witnesses (if any):

Signature Title
 /s/ *M. J. Amico* *C.O.*

(No. of Supplementary sheets 1)

Signature Title

**Affidavit of LeMar A. Clor, in Support of Defendants'
Motion for Summary Judgment.**

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

LEMAR A. CLOR, Correction Lieutenant at the Attica Correctional Correctional Facility, being duly sworn, deposes and says that he resides at 8845 Walnut Street Road, Batavia, New York.

That he was chairman of the Adjustment Committee at the Attica Correctional Facility on June 7, 1972, wherein, inmate Larkins appeared before the Said Committee, comprised of your deponent, Gerald R. Elmore, Correction Counselor and Correction Officer George Brimmer.

The Committee stated the charges to Larkins, namely, that he had conducted a meeting in "A" Yard during which he improperly lectured to the other five (5) inmates in the group, wherein, he advocated the disruption and overthrow of the institution. The Committee further charged him with the possession of inflammatory written materials.

Larkins admitted that he was affiliated with the Black Panther Party and that he believed in Revolution and that forceful overthrow of existing authority was the only way to achieve certain ends.

Larkins never denied that he had lectured to the group of the other five (5) inmates on the advocacy of the overthrow of the institution.

In the exercise of sound discretion, the Committee decided unanimously that disciplinary action should be taken. The discretion exercised by the Committee was with the full realization of Larkins' procedural due process rights. The Committee was also mindful of its duties and obligations to maintain a safe climate within the institution. The Committee would be derelict in its duties if it knowingly permitted the continuation of a situation which could

Affidavit of Correction Officer Michael Amico.

potentially evolve into a calamity. The inmate also has a duty and a responsibility to his fellow inmates with a view to maintaining harmony and tranquillity within the institution.

In every stage of the proceedings, the Committee and everyone concerned acted within the scope of their lawful authority as mandated by the New York State Correction Law and the various regulations thereunder.

/s/ LEMAR A. CLOE
Correction Lieutenant

(Sworn to April 4, 1973.)

**Affidavit of Correction Officer Michael Amico, in
Support of Defendants' Motion for Summary
Judgment.**

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

MICHAEL J. AMICO, Correction Officer at the Attica Correctional Facility, being duly sworn, deposes and says that he resides at 730 Exchange Street, Town of Attica, New York.

On June 6, 1972, I was working on the day shift, 7 a.m. to 3 p.m., assigned to "A" Block. About 2:30 p.m., Correction Officer Gene Tiede and I were observing the actions of the "A" Yard inmates, at which time we observed six (6) inmates in a group.

I was familiar with Larkin's past at the institution and I knew that he was an active leader in instigating dissent.

Affidavit of Correction Officer Michael Amico.

I knew that he constantly defied institutional rules and policies and that he encouraged other inmates to be defiant of proper rules and policies of the institution and that he was pursuing a persistent course of disturbing the tranquillity of the institution.

Thereupon, Officer Tiede and I went to Larkin's cell. With the memory of the tragic September 1971 riot at Attica still vivid in my mind, I was fearful that this meeting among six (6) inmates, at which Larkins' was speaking, was a sign that some problems was in the stage of development. Whereupon, Officer Tiede and I proceeded to the cells of Larkin's and Tinsley. We found certain inflammatory documents, a copy of which is annexed hereto, in the cell of Larkin's. We also found in Tinsley's cell a set of notes describing the method of making a bomb. In a disciplinary proceeding, Tinsley admitted having materials among his personal property describing the method of making bombs. In the disciplinary proceeding for Larkins', he readily admitted that he was affiliated with the Black Panter Party and that he believed in Revolution.

Officer Tiede and I confiscated the above described materials in the cells of Larkin's and Tinsley.

/s/ MICHAEL J. AMICO
Correction Officer

(Sworn to April 4, 1973.)

**Affidavit of Correction Officer Gene A. Tiede, in
Support of Defendants' Motion for Summary
Judgment.**

STATE OF NEW YORK }
COUNTY OF WYOMING } ss.:

GENE A. TIEDE, Correction Officer at the Attica Correctional Facility, being duly sworn, deposes and says that he resides at 3047 Pratt Road, Batavia, New York.

On June 6, 1972, I was working on the day shift, from 7 a.m. to 3 p.m., in the "A" Block. About 2:30 p.m., while walking in the "A" Yard, I came upon six (6) inmates at a table. One (1) inmate was standing. The other five (5) inmates were sitting around the table. The inmate that was standing was speaking. As I approached, the inmate stopped speaking. Whereupon, I walked to the yard platform where Correction Officer John King was stationed on duty. I asked Officer King as to the identity of the men in the group around the table and the identity of the inmate who was doing the speaking. Officer King told me that the speaker was Larkins and that another member of the group was Tinsley, and that they are assigned to Company 10, which was Officer King's Company.

Realizing that it was unusual for six (6) inmates to be gathered in a group, and one (1) of them appearing to be lecturing the other five (5), as if in a study group, and in the exercise of prudence, I joined Officer Amico and proceeded to the cells of Larkins and Tinsley. We found certain inflammatory documents in Larkin's cell. In Tinsley's cell, we found handwritten notes on the method of making a bomb. We confiscated the above mentioned materials.

/s/ GENE A. TIEDE
Correction Officer

(Sworn to April 4, 1973.)

**Plaintiffs' Notice of Cross-Motion for
Summary Judgment.**

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Robert B. Conklin, the original petition of the Plaintiff, sworn to on June 19, 1972, the affidavit in opposition of Bedros Odian, sworn to on July 13, 1972, the affidavit of Plaintiff in rebuttal sworn to on July 20, 1972, the summons, complaint, answer, and the exhibits attached to the Defendant's motion for summary judgment herein, which motion was originally returnable on April 13, 1973, and adjourned to and now returnable on July 26, 1973, and upon all pleadings and proceedings heretofore had herein, the Plaintiff will move this Court at a Motion Term to be held in the United States Court House, Buffalo, New York, on the 26th day of July, 1973, at 10:00 A.M., or as soon thereafter as counsel can be heard, for an order pursuant to Rule 56 of the Federal Rules of Civil Procedure granting a summary judgment in favor of the Plaintiff and against the Defendant upon the ground that there is no genuine issue of any material fact and that the Plaintiff is entitled to a judgment as a matter of law together with the costs and disbursements of this action.

Dated: Buffalo, New York
June 27, 1973.

/s/

ROBERT B. CONKLIN, Esq.
Attorney for Plaintiff
Office and Post Office Address
1800 One M & T Plaza
Buffalo, New York 14203
(716) 856-4000

To:

LOUIS J. LEFKOWITZ, Esq.
Attorney General of the
State of New York
Attorney for Defendants
65 Court Street
Buffalo, New York 14202
Attention: Bedros Odian, Esq.

**Affidavit of Robert B. Conklin, in Support of
Plaintiff's Cross-Motion for Summary Judgment.***

STATE OF NEW YORK }
COUNTY OF ERIE } ss.:

ROBERT B. CONKLIN, being duly sworn, deposes and says:

1. I am an attorney-at-law, duly admitted to practice in the United States District Court, Western District of New York, and I was assigned to represent the Plaintiff in the above-captioned action by order of the Hon. John T. Curtin, United States District Judge, dated September 13, 1972. This affidavit is submitted in support of Plaintiff's motion for a summary judgment against the Defendants on the issue of liability, with the request that the Court direct an immediate trial to hear the issue of damages due to Plaintiff from the responsible Defendants. As part of Plaintiff's motion, it is respectfully requested that the Defendants' motion for summary judgment be denied in all respects.

2. This proceeding was commenced on or about June 19, 1972, when the Plaintiff filed a petition with the United States District Court, Western District of New York, seeking relief against various of the Defendants on account of violation of Plaintiff's rights under the First, Fifth and Fourteenth Amendments of the United States Constitution and the Civil Rights Act, Title 42, United States Code, Section 1983. In said petition, Petitioner alleged that he was placed in segregation on June 7, 1972 by members of the Attica Adjustment Committee and confined to June 19, 1972 for having alleged inflammatory and revolutionary documents in his cell. A copy of the Plaintiff's petition is attached hereto, marked Exhibit "A", and made a part hereof.*

* Reprinted *supra* at 5a-6a.

Affidavit of Robert B. Conklin.

3. Thereafter, and on or about July 13, 1972, Bedros Odian, Esq., an Assistant Attorney General of the State of New York, acting on behalf of Russell G. Oswald, Commissioner of Correction of New York State, and Ernest L. Montanye, Warden of Attica Correctional Facility, filed an affidavit acknowledging that certain written materials, concededly "political materials", were found in Plaintiff's cell and thereafter confiscated. Mr. Odian's affidavit admits that disciplinary proceedings were conducted, and, according to a letter dated July 11, 1972, from Harold Smith, Deputy Superintendent of Attica Correctional Facility, Plaintiff was locked up on a misbehavior report for having inflammatory and revolutionary papers in his possession on June 6, 1972. Apparently acknowledging the wrongful conduct on the part of the Attica Adjustment Committee in punishing Plaintiff for having political materials in his cell, Mr. Odian recommended expunging Plaintiff's punishment record of confinement and confirmed that the Plaintiff had not lost any "good time". A copy the affidavit of Bedros Odian is attached hereto, marked Exhibit "B", and made a part hereof.*

4. Thereafter, and on or about July 20, 1972, Plaintiff submitted an affidavit "in rebuttal to opposition", reiterating a violation of his Constitutional rights. A copy of Plaintiff's affidavit, sworn to on July 20, 1972, is attached hereto, marked Exhibit "C", and made a part hereof.**

5. Thereafter, and on or about September 13, 1972, the Hon. John T. Curtin, United States District Judge, issued a decision and order stating in pertinent part:

"Respondent's counsel indicates that certain handwritten documents of a political nature were found

* Reprinted *supra* at 7a-8a.

** Reprinted *supra* at 9a.

Affidavit of Robert B. Conklin.

in petitioner's cell and confiscated. Subsequent disciplinary proceedings resulted in petitioner's confinement in Housing Block 'Z'. Respondent's counsel indicates that the period of confinement was seven (7) days, while petitioner's reply affidavit contends that it was twelve (12) days. *In any event, the punishment was contrary to the principals set forth in Sostre v. McGinnis*, 442 F.2d 178, 202-03 (2d Cir. 1971)."

Although the Court held that Plaintiff's application for injunctive relief should be dismissed as moot, it allowed the plaintiff to proceed in forma pauperis to commence a civil action for damages against the Defendants, and assigned your deponent to represent the Plaintiff in this regard.

6. Thereafter, and on or about March 6, 1973, Plaintiff commenced an action against the Defendants in the above-captioned action by filing a complaint seeking judgment against the Defendants, jointly and severally, in the amount of Five Thousand Dollars (\$5,000) together with the costs and disbursements of this action. This complaint, which is on file in this Court, alleged that Plaintiff was confined in isolation in violation of his rights under the First, Fifth, and Fourteenth Amendments of the United States Constitution and, consequently, in violation of the Civil Rights Act, Title 42, United States Code, Section 1983.

7. Thereafter, and on or about April 6, 1973, all of the Defendants in the above-captioned action answered by the Attorney General of the State of New York, and asserted certain admissions, denials, and other defenses to the cause of action asserted in Plaintiff's complaint. The Defendants' answer is also on file with this Court.

8. By admitting all of the allegations contained in paragraphs "First" through and including "Fifth" of the

Affidavit of Robert B. Conklin.

complaint, Defendants admitted their residence in the State of New York and employment by the New York State Department of Correction. The Defendants, Oswald and Montanye, admitted that they were respectively the Commissioner of the Department of Correction of the State of New York and the Superintendent of the Attica Correctional Facility, each charged with the duties and responsibilities set forth in the applicable provisions of the Correction Law of the State of New York. In addition, the Defendants, Clor and Elmore, admitted being stationed at the Attica Correctional Facility at times pertinent in this action and acting under the supervision and control of the Defendants, Montanye and Oswald.

9. By denying "all of paragraph designated as "Sixth" which tends to say that inflammatory and revolutionary papers were not being distributed or published", Defendant impliedly acknowledged the following:

1. That on or about June 7, 1972 Plaintiff was confined in Housing Block "Z" on a misbehavior report for having inflammatory and revolutionary papers in his possession on or about June 6, 1972;
2. That Plaintiff was confined for approximately twelve (12) days;
3. That the alleged inflammatory and revolutionary papers were found in Plaintiff's cell.

In fairness to the Defendants, they clearly deny Plaintiff's allegation that said papers were *not* being distributed or published by the Plaintiff.

10. By neither denying nor admitting the allegations contained in paragraphs "Seventh", "Eighth", and "Ninth" of the complaint herein, the Defendants have admitted, by virtue of Rule 8(d) of the Federal Rules of Civil Procedure, that the isolation of the Plaintiff from

Affidavit of Robert B. Conklin.

June 7, 1972 to on or about June 19, 1972 was ordered by the Attica Adjustment Committee, comprised of, among others, the Defendants, Clor and Elmore. In addition, Defendants admit that the Defendants, Montanye and Oswald, knew, or should have known, "that the Plaintiff had been isolated for the reasons and during the period hereinbefore alleged". The Defendants also admit that the Defendants, Oswald and Montanye, took no action to release or relieve the Plaintiff from the conditions of his isolation. Finally, without admitting any wrongful conduct on their part, the Defendants admit that they were acting at all times "within the scope of their authority" and admit the various aspects of damages (without admitting the amount thereof) alleged in paragraph "Ninth" of the complaint herein.

11. Notwithstanding the admissions made by the Defendants in their responsive pleading, they have moved for summary judgment dismissing Plaintiff's action, urging that they are entitled to judgment as a matter of law. A review of Defendants' motion for summary judgment, and the exhibits attached thereto, should reveal that it is *now* Defendants' claim that Plaintiff was punished for other conduct, in addition to having alleged inflammatory and revolutionary papers in his cell. It is now claimed that the Plaintiff was "lecturing" to five inmates about the overthrow of the institution on or about June 6, 1972. Defendants also argue that the character of the alleged inflammatory and revolutionary papers was, in fact, an attempt at communication between inmates. However, this new argument made by Defendants' counsel runs counter to the affidavits and exhibits attached to Defendants' motion for summary judgment, to wit:

a. The affidavit of Gene Tiede, sworn to on April 4, 1973, only supports a finding that six inmates were conversing at a table in "A" Yard about 2:30 P.M. on

Affidavit of Robert B. Conklin.

June 6, 1972. The officer obviously did not hear any conversation between the inmates, and was unable to describe any unusual conduct on the part of the inmates.

b. The affidavit of Michael J. Amico, sworn to on April 4, 1973, supports a finding that six inmates were gathered in a group in "A" Yard at approximately 2:30 P.M. on June 6, 1972. Officer Amico did not hear any conversations or observe any unusual conduct on the part of the inmates. His only reason for deciding to search the Plaintiff's cell was his claimed familiarity with Plaintiff's past at the institution (i.e., "I knew that he was an active leader in instigating dissent").

c. The affidavit of LeMar A. Clor, sworn to on April 4, 1973, confirms that he was a member of the Adjustment Committee before whom the Plaintiff appeared on June 7, 1972. For the first time in Clor's affidavit is the claim made that Plaintiff had "conducted a meeting in "A" Yard during which he improperly lectured to the other five inmates in the group wherein he advocated the disruption and overthrow of the institution". Clor acknowledges that the Committee further charged him with possession of inflammatory written materials.

d. Exhibit 4 in Defendants' motion for summary judgment is the record of the Adjustment Committee with respect to the Plaintiff's conduct on June 6, 1972. A reading of the complaint filed by Officer Michael J. Amico on June 6, 1972, and the Plaintiff's punishment record, indicates that Plaintiff was punished in Housing Block "Z" for seven (7) days with no yard or recreation privileges because he "had in his possession revolutionary papers and Black Panther Party papers." Interestingly, Amico's complaint does not

Affidavit of Robert B. Conklin.

even suggest "lecturing" or revolutionary talk in the yard. It simply states that Plaintiff was in a group of six inmates talking in the yard.

e. Reference is made in the Defendants' motion for summary judgment to action taken in respect of another inmate named Larry Tinsley. Apparently, Tinsley was in the group talking with Plaintiff, and others, in "A" Yard on June 6, 1972. In searching Tinsley's cell, the officers found a paper with instructions on how to make a bomb. Tinsley, however, was simply counseled and released by the Adjustment Committee.

12. All the affidavits before the Court, and the facts contained therein, support but one conclusion. Plaintiff was punished for having alleged inflammatory or revolutionary materials in his cell. No other charge was made against him at the time of the Adjustment Committee meeting and no such charge could have been sustained on the facts now before the Court. In short, Plaintiff was confined in Housing Block "Z" simply because officers found alleged inflammatory and revolutionary papers in his cell on June 6, 1972.

WHEREFORE, it is respectfully requested that the Court grant summary judgment in favor of the Plaintiff against all of the Defendants on the issue of liability, and then direct an immediate trial to determine the amount of damages due to the Plaintiff, together with the costs and disbursements of this action.

Dated: Buffalo, New York
June 27, 1973

/s/ ROBERT B. CONKLIN

(Sworn to June 29, 1973.)

Opinion and Order, October 5, 1973.

APPEARANCES: ROBERT B. CONKLIN, Esq., Buffalo, New York, for the Plaintiff.

LOUIS J. LEFKOWITZ, Attorney General of the State of New York (Bedros Odian, of Counsel), Buffalo, New York, for the Defendants.

CURTIN, D.J.

Pending before the court for decision are motions for summary judgment filed by both parties. Plaintiff alleges that on June 7, 1972 he was placed in segregation by an Attica Adjustment Committee for having "inflammatory writing" in his cell and he is therefore being punished for his political beliefs. See *Sostre v. McGinnis*, 442 F.2d 178, 202-203 (2d Cir. 1971). By prior order of this court, plaintiff was permitted to proceed in forma pauperis and Robert B. Conklin, Esq. was assigned to represent him.

The essential facts are not in dispute. On June 6, 1972, correction officers Michael Amico and Gene Tiede, assigned to "A" Block in the Attica Correctional Facility, observed plaintiff Tyrone Larkins speaking to a group of five other inmates in the yard. Correction officer John King, who was close by, identified the plaintiff, Tyrone Larkins, as the speaker and inmate Larry Tinsley as one of the members of the group.

In his affidavit filed in support of this motion, Officer Amico explained that he knew that Larkins had a reputation as an instigator and dissenter and, for this reason, he and Tiede searched the cells of Larkins and Tinsley. In Larkins' cell, the officers found the political tract which became the subject of the proceeding against him and, in Tinsley's cell, the officers found notes describing plans to construct a bomb. Tinsley did not file an action in this court. When he appeared before the Adjustment Committee, he was counseled and released to general population.

Opinion and Order, October 5, 1973.

After finding the papers, Amico immediately filed an Inmate Misbehavior Report against Larkins stating:

Upon observing this man [Larkins] in the yard with a group of inmates Officer Tiede and myself frisked this man's cell and found Black Pantor [sic] Party papers and revolutionary papers in his cell.

On June 7, 1972, Larkins appeared before the Adjustment Committee. The report of the Committee states:

Inmate appears belligerent and uncooperative toward institutional policies—believes in revolution—inmate admits affiliation to Black Panther Party.

The Committee's action was to confine Larkins in HBZ for seven days with loss of yard and recreation.

In the action filed in this court, the plaintiff seeks money damages for what he claims was the improper action of the Committee. In support of their motion for summary judgment, the defendants have filed affidavits by Lieutenant LeMar A. Clor, who presided at the Adjustment Committee hearing, and by Officers Amico and Tiede. No affidavit was filed by correction officer John King. In his affidavit, Lt. Clor states that, at the Adjustment Committee meeting, Larkins was charged with advocating to the group in the yard the overthrow of the institution and the possession of inflammatory written materials. Lt. Clor describes Larkins' reaction as follows:

Larkins admitted that he was affiliated with the Black Panther Party and that he believed in Revolution and that forceful overthrow of existing authority was the only way to achieve certain ends.

Larkins never denied that he had lectured to the group of the other five (5) inmates on the advocacy of the overthrow of the institution.

Opinion and Order, October 5, 1973.

Considering the facts in the light most favorable to the defendants, relief must be given to the plaintiff. There is a discrepancy between the Adjustment Committee report and Lt. Clor's affidavit in which he described the proceedings before the Adjustment Committee. In his affidavit, Lt. Clor stated that the plaintiff was charged with advocating to the five inmates the overthrow of the institution. Officer Amico's Misbehavior Report, which formed the basis of the charge before the Committee, relates only that Larkins was in the yard with a group of inmates and that the Black Panther Party papers were found in his cell. From the Adjustment Committee report, it appears that there was some general discussion about plaintiff's attitude toward the institution, but nothing is said about what remarks Larkins directed to the inmates in the yard. In discussing specifically what Larkins said in the yard, Lt. Clor is only able to state:

Larkins never denied that he had lectured to the group of the other five (5) inmates on the advocacy of the overthrow of the institution.

None of the officers heard what Larkins said to the group. From the record of the proceedings and the affidavits filed by the officers, it is clear that there was no charge or evidence before the Committee that Larkins had advocated the overthrow of the institution.

That leaves for consideration whether Larkins may be punished for possessing the papers found in his cell.¹ This writing is entitled "The Black Panther Party Ten Point Program—Platform." There is no evidence at all that Larkins had circulated this writing in the institution. Furthermore, although his position may be extreme in

¹ The Court attached here the materials found in plaintiff's cell, reprinted *supra* at .

Opinion and Order, October 5, 1973.

some points, yet many of the aspirations set forth in the paper are hard to fault. The demands relate to freedom, full employment, an end to the exploitation of the black community, decent housing, education, the desire for black men to be exempt from military service, an end to police brutality in the black community, freedom for black men held in prisons and a demand that black defendants go to trial before a black jury. These principles are espoused by many individuals in the American community. Under the guidance of *Sostre v. McGinnis, supra*, the court finds that there was nothing wrong with Larkins having his document in his cell and it was improper for the Adjustment Committee to punish him for having it there. The additional reasons for punishment set forth in the affidavit of Lt. Clor are not supported by the record. Partial summary judgment is granted to the plaintiff. The question of damage remains. The attorneys shall meet with the court on October 12, 1973 at 11:00 A.M. to determine what proceedings shall follow.

So ordered.

/s/ JOHN T. CURTIN
United States District Judge

Dated: October 5, 1973.

**Defendants' Notice of Motion to Set Aside the Verdict
as Excessive.**

PLEASE TAKE NOTICE, that the undersigned will move this Court at Part II, United States Court House, Buffalo, New York, on the 7th day of February, 1974 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order setting aside the verdict in this action on the basis of its being excessive, as more fully set forth in the Affidavit in Support of Motion.

Dated: Buffalo, New York
January 31, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

By: /s/ BEDROS ODIAN
Assistant Attorney General
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202

To:

ROBERT B. CONKLIN, Esq.
Attorney for Plaintiff
1800 One M & T Plaza
Buffalo, New York 14203

**Affidavit of Bedros Odian, in Support of Defendants'
Motion to Set Aside the Jury Verdict as Excessive.**

STATE OF NEW YORK }
COUNTY OF ERIE } ss.:
CITY OF BUFFALO }

BEDROS ODIAN, being duly sworn, deposes and says:

He is on the staff of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for the defendants, and he is familiar with the proceedings herein.

This affidavit is submitted to induce the Court to set aside the jury verdict herein.

The \$1,000.00 verdict by the jury is excessive. It is entirely punitive. Any compensatory component there might be in the verdict flows from the self-serving testimony of the plaintiff relative to psychological injury. He was denied yard privileges, whereas on some occasions, he did in fact leave the cell for medical treatments, one attorney visitation and for shaves and showers. In effect, he was awarded \$1,000.00 for lack of yard privileges. In chronological terms, the verdict is equivalent to \$30,000.00 on an annual basis. The verdict is clearly excessive.

WHEREFORE, it is prayed that the jury verdict herein be set aside as being excessive.

/s/ BEDROS ODIAN

(Sworn to January 31, 1974.)

Opinion and Order, March 14, 1974.

APPEARANCES: ROBERT B. CONKLIN, Esq., Buffalo, New York, for the Plaintiff.

LOUIS J. LEFKOWITZ, Attorney General of the State of York (Bedros Odian, of Counsel), Buffalo, New York, for the Defendants.

CURTIN, D.J.

By order of October 5, 1973, the court granted the plaintiff's motion for partial summary judgment and left for jury consideration the question of the amount of damage. On January 28, 1973, a jury returned a verdict against the defendants in the sum of \$1,000. Defense counsel has moved to set aside the jury verdict as excessive.

In its October 5, 1973 decision, the court held that defendant while an inmate of Attica Correctional Facility was unlawfully confined in segregation for a period of twelve days. The jury heard evidence of the difference between incarceration in the general population at Attica and incarceration in the segregation unit. Perhaps the sum of \$1,000 is more than the court would have awarded to the plaintiff, but there is evidence in the record to support the verdict and it should not be disturbed. See *Grunenthal v. Long Island R. Co.*, 393 U.S. 156 (1968). Furthermore, it was at the insistence of the defendant that this case was tried to a jury rather than to the court alone.

The liability of all defendants on the judgment is conceded. The Clerk is directed to enter judgment in the sum of \$1,000 against all defendants jointly and severally, with costs to the plaintiff.

So ordered.

/s/ JOHN T. CURTIN
United States District Judge

Dated: March 14, 1974.

Judgment, March 15, 1974.

This action came on for trial before the Court and a jury, Honorable John T. Curtin, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Tyrone Benjamin Larkins, have judgment against the defendants, Russell G. Oswald, Commissioner of Correction of New York State; Ernest L. Montanye, Warden of Attica Correctional Facility, Lieutenant LeMar A. Clor, and Social Worker Gerald Elmore, jointly and severally in the amount of \$1,000.00, with costs to the plaintiff.

Dated at Buffalo, New York, this 15th day of March, 1974.

JOHN K. ADAMS
Clerk of Court

Notice of Appeal.

PLEASE TAKE NOTICE that the defendants herein hereby appeal from the judgment entered on March 15, 1974 in the office of the Clerk of the United States District Court for the Western District of New York, and from each and every part of said judgment.

Dated: Buffalo, New York
March 28, 1974

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants

By:

/s/ BEDROS ODIAN
Assistant Attorney General
Office & P. O. Address:
65 Court Street
Buffalo, New York 14202
Telephone: 842-4383

To:

CLERK
United States District Court
Western District of New York
United States Court House
68 Court Street
Buffalo, New York 14202

ROBERT B. CONKLIN, Esq.
1800 One M & T Plaza
Buffalo, New York

(56622)

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Mary Ko , being duly sworn, deposes and
says that he is employed in the office of the Attorney
General of the State of New York, attorney for defendants-appellants
herein. On the 5th day of September, 1974, he served
the annexed upon the following named person :

Phylis Skloot Bamberger, Esq.
The Legal Aid Society
United States Courthouse
Foley Square
New York, New York 10007

Attorney in the within entitled appeal by depositing
a true and correct copy thereof, properly enclosed in a post-
paid wrapper, in a post-office box regularly maintained by the
Government of the United States at Two World Trade Center,
New York, New York 10047, directed to said Attorney at the
address within the State designated by her for that
purpose.

Mary Ko

Sworn to before me this
5 day of September, 1974

Deputy Margaret Evans Radley
Assistant Attorney General
of the State of New York